COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

ORACLE USA, INC. v. **COMMISSIONER OF REVENUE**

Docket No. C318441

Promulgated:
November 27, 2019

ORACLE AMERICA, INC.

DOCKET NO. C318442

MICROSOFT LICENSING, GP

DOCKET NO. C327798

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate sales tax on the sale or licensing of computer software ("sales at issue") to Hologic, Inc. ("Hologic") by Oracle USA, Inc., Oracle America, Inc., and Microsoft Licensing, GP ("appellants") for various monthly tax periods (collectively, the "tax periods at issue").[1]

The Appellate Tax Board ("Board"), on its own motion, promulgated these findings of fact and report contemporaneously

[1] The applicable tax periods for each of the appellants are: Oracle USA, Inc.- May 2009 and August 2009 through and including January 2010; Oracle America, Inc. - March 2010, May 2010, August 2010, October 2010 through and including February 2011, May 2011, June 2011, and August 2011 through and including February 2012; and Microsoft Licensing, GP - December 2009, October 2010, December 2010, January 2011, and December 2011.

with a revised decision for the appellants, in which Chairman Hammond, and Commissioners Rose, Good, Elliott, and Metzer joined.

John S. Brown, Esq., *George P. Mair*, Esq., *Donald-Bruce Abrams*, Esq., and *Adam M. Holmes*, Esq. for the appellants.

Marikae Grace Toye, Esq. and *Timothy R. Stille*, Esq. for the Commissioner.

FINDINGS OF FACT AND REPORT

I. BOARD PROCEEDINGS

The parties waived a hearing on these matters and proceeded based on a Statement of Agreed Facts, Exhibits, and briefs. The Board initially issued a decision for the appellee ("Initial Decision"). After further consideration, on March 25, 2019, the Board issued an Order Under Rule 33 of its Rules of Practice and Procedure ("Rule 33 Order") vacating the Initial Decision. The Rule 33 Order also incorporated rulings and findings that supported a decision for the appellants and ordered the parties to perform a Rule 33 calculation of abatements consistent with the Board's rulings and findings.

On April 4, 2019, the Commissioner filed a Motion for Reconsideration, which was heard on April 11, 2019. By Order dated May 20, 2019, the Board issued supplemental findings and directed the parties to file additional written arguments in support of their positions as they deemed necessary. Both parties submitted

arguments, and on July 9, 2019, the Board denied the Commissioner's Motion for Reconsideration and renewed the Rule 33 Order, giving the parties thirty days to comply.

In response, the appellants submitted a Rule 33 calculation consistent with the amounts at issue detailed in the Statement of Agreed Facts and other submissions, which were based on apportionment percentages specific to each of the appellants. For his part, the Commissioner submitted a calculation asserting an abatement of $0.00 founded on his conclusion that Hologic was not entitled to apportion the sales tax at issue and, alternatively, argued that a calculation was not yet possible because the Commissioner lacked relevant information.

For the reasons described below, the Board adopted the appellants' Rule 33 calculations and granted abatements to the appellants in those amounts.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Hologic develops, manufactures, and supplies medical diagnostic equipment. During the tax periods at issue, Hologic's headquarters was located in Bedford, Massachusetts and the company had employees and offices both inside and outside of Massachusetts. Hologic's information technology procurement function, which was located in Massachusetts, served all of Hologic's locations and its various business functions, including its research and

development, manufacturing, financial, sales, and administrative functions.

Also during the tax periods at issue, Hologic purchased or licensed software from the appellants and installed the software on servers located in Massachusetts for use by employees inside Massachusetts and at Hologic's offices around the country and internationally. Hologic's employees accessed the software from their various local work locations. The appellants each collected sales tax from Hologic on the amounts that Hologic paid for the software during the tax periods at issue, timely remitted the sales tax to Massachusetts, and timely reported the tax on Forms ST-9: Sales and Use Tax Returns ("Forms ST-9").[2]

Subsequently, Hologic informed the appellants of its intended and actual use of the software in multiple locations and provided data to the appellants that showed the percentage of use outside of Massachusetts. The appellants each filed Forms CA-6: Applications for Abatement/Amended Returns ("Forms CA-6" or "abatement applications") for the tax periods at issue, seeking abatements and refunds of sales tax consistent with the usage data and consequent apportionment percentages provided by Hologic.[3] The

---

[2] Hologic, not a holder of a direct pay permit under G.L. c. 64H, § 3, did not provide the appellants with either a Form ST-12 ("Form ST-12" or "exempt use certificate") or certify the accuracy of an apportionment as provided for in the Commissioner's regulation, 830 CMR 64H.1.3(15).

[3] On the Forms CA-6, the appellants sought abatement and refund of sales tax in the following amounts: Oracle USA, Inc. - $59,098.27; Oracle America, Inc. - $185,323.34; and Microsoft Licensing, GP - $119,306.74.

appellants also provided the Commissioner with sales tax claim waivers and refund assignments, acknowledging that any refunds received would be refunded to Hologic pursuant to G.L. c. 62C, § 37. Oracle USA, Inc. and Oracle America, Inc. provided Hologic with provisional credits for any refunds, and Microsoft Licensing, GP agreed to credit Hologic's account for any refund. The Commissioner denied the appellants' abatement applications.

Jurisdictional documentation in the record for each of the appellants and the respective tax periods at issue established that all Forms ST-9, Forms CA-6, and petitions before the Board were timely filed, and so the Board found and ruled that it had jurisdiction over these appeals.

III. CONCLUSION

Based on the record in its entirety, which included submissions from the parties received throughout the Board proceedings as well as transcripts of oral arguments, the Board found and ruled that the appellants properly sought apportionment of the sales tax at issue in these appeals for the reasons discussed in the Opinion below. With this conclusion in mind, final disposition of the appeals depended on correct calculation of the abatements due to the appellants.

In his Rule 33 calculation, the Commissioner cited only legal impediments to an appropriate calculation, taking no issue with relevant totals claimed on the appellants' Forms CA-6 or those in

the Statement of Agreed Facts, which were stipulated as abatements due should the appellants prevail on relevant legal issues and a Rule 33 calculation. The Commissioner also explicitly stated that he did not intend to challenge the appellants' claimed apportionment percentages. Further, the Commissioner did not dispute stated amounts of tax collected and remitted by the appellants, which were also supported by stipulated copies of invoices rendered by the appellants to Hologic. Applying the apportionment percentages to the tax totals produced a result consistent with the abatement amounts claimed by the appellants.[4]

In sum, having resolved the legal issue presented in favor of the appellants and applied uncontested apportionment percentages to undisputed amounts of sales tax, the Board issued a decision for the appellants and ordered abatements of $59,099, $185,323, and $119,306.78, respectively, for Oracle USA, Inc., Oracle America, Inc., and Microsoft Licensing, GP, plus associated interest under G.L. c. 62C, § 40.

[4] The Board noted a minor discrepancy of $1.04 among the amounts requested on the appellants' Forms CA-6, the appellants' Rule 33 calculation, and the stipulated sums at issue in the Statement of Agreed Facts. Totaling available figures, the Board determined that the amounts in the appellants' Rule 33 calculation were correct.

OPINION

I. THE GOVERNING STATUTE

Massachusetts law imposes a tax on sales of tangible personal property in the Commonwealth. G.L. c. 64H, §§ 1 and 2. General Laws c. 64H, § 1 ("§ 1"), in pertinent part, defines tangible personal property as:

> personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth . . . ***A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property.***

(emphasis added).

Effective April 1, 2006, the definition of tangible personal property was amended, in part to incorporate the language emphasized above. St. 2005, c. 163, §§ 34 and 61, approved December 8, 2005. The change was intended, in large measure, to create uniform sales and use tax treatment for all sales of standardized software, whether the software is delivered via tangible media, such as a CD-ROM, electronically, or by means such as "load and leave."

The amendment also authorized the Commissioner to promulgate regulations to "provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." St. 2005, c. 163, §§ 34 and 61. Subsequently, the

Commissioner promulgated a new version of 830 CMR 64H.1.3 ("Regulation") that included provisions discussing apportionment of sales of standardized software. *See* 830 CMR 64H.1.3(15). By the Regulation's terms, its provisions were effective October 20, 2006, and applied retroactively to transactions on and after April 1, 2006.

II. THE REGULATION

The Regulation contains two primary apportionment provisions, both of which, through their application, relieve vendors of specific liabilities: 830 CMR 64H.1.3(15)(a) transfers reporting liability from a vendor to a purchaser; and 830 CMR 64H.1.3(15)(b) relieves vendors of "any further obligation" after collecting and remitting tax pursuant to its terms. *See* 830 CMR 64H.1.3(15)(a) and (15)(b) ("¶ (15)(a)" and "¶ (15)(b)," respectively).

Paragraph (15)(a) requires that a purchaser who "knows at the time of its purchase of prewritten computer software that the software will be concurrently available for use in more than one jurisdiction" provide a Form ST-12 to the vendor "no later than the time the transaction is reported for sales or use tax purposes."[5]

[5] Paragraph 15(a) also exempts holders of a direct pay permit from these requirements, although permit holders must follow its guidance relating to apportionment methodologies. A direct pay permit, pursuant to G.L. c. 64H, § 3, transfers liability for reporting and remitting sales tax from a vendor to the holder of the permit.

The provisions of ¶ (15)(b) involve a seller that "knows that the prewritten software will be concurrently available for use in more than one jurisdiction" but has not been provided an exempt use certificate by the purchaser. In these circumstances, ¶ (15)(b) provides that the seller "may work with the purchaser to produce the correct apportionment," to which the purchaser must certify, and which certification the seller must accept. The seller then collects and remits the tax to the appropriate jurisdictions. Although ¶ (15)(b) does not explicitly state when the apportionment determination and certification must be completed, the Commissioner argued that the language of ¶ (15)(b) unequivocally implies that both must occur, like ¶ (15)(a), by the time a transaction must be reported to the Commissioner

Paragraphs (15)(a) and (15)(b) also provide substantive guidance for how to apportion. Both allow use of "any reasonable, but consistent and uniform, method of apportionment that is supported by . . . records as they exist at the time the transaction is reported for sales or use tax purposes."[6] Paragraph (15)(a) further explains that

> [a] reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on number of computer terminals or licensed users in each jurisdiction where the software will be used. A reasonable, but consistent and uniform method of

[6] Paragraphs (15)(a) and (15)(b) have slightly different requirements regarding use and retention of books and records, none of which are dispositive in the instant appeals.

apportionment may not be based on the location of the servers where the software is installed.

III. THE COMMISSIONER'S POSITION

The Commissioner posited that § 1, by itself, does not afford the right to apportion sales of standardized software. In the Commissioner's view, absent his action by regulation, no such right would exist. The Commissioner then effectively rested his case on the argument that the sole means by which Hologic could apportion the sales at issue was to comply with the terms of either ¶ 15(a) or ¶ 15(b).[7] Given that Hologic did not provide the appellants with Forms ST-12 or apportionment certifications, the Commissioner argued that apportionment was foreclosed and the requested abatements should be denied. The Board disagreed with the Commissioner's reasoning and conclusions.

IV. THE BOARD'S RULINGS

As a threshold matter, the Board ruled that § 1 itself grants taxpayers the right to apportion sales tax on a sale of taxable software that is "transferred for use in more than one state." Pursuant to § 1, the Commissioner's role is to prescribe rules for that apportionment by regulation. To conclude that apportionment is not a right granted by § 1 would require acceptance of the proposition that the Commissioner may determine the contours of a

[7] For reasons that remain unclear, in his brief preceding the issuance of the Board's Initial Decision, the Commissioner claimed that provision of a Form ST-12 under ¶ 15(a) was the exclusive means for apportionment.

process for which there is no underlying right. The Board found this proposition illogical and inconsistent with the plain language of the statute. This having been said, the central question of these appeals remains, which is whether and how the Regulation affects the right of the appellants to request apportionment via the abatement process under G.L. c. 62C, § 37.

Hologic purchased or licensed taxable software from the appellants, intending to use the software in multiple jurisdictions. These are precisely the circumstances under which § 1 contemplates apportionment of the sales tax. Hologic paid sales tax on the entire purchase price, and sometime later informed the appellants of its intended and actual use of the software in multiple locations. Hologic also provided data that showed the percentage of use outside of Massachusetts, thereby adhering to the Regulation's substantive guidance regarding appropriate apportionment methodologies. The appellants then timely sought apportionment through the abatement process under G.L. c. 62C, § 37.

The provisions of G.L. c. 62C, § 37 state, in relevant part, that "[a]ny person aggrieved by the assessment of a tax, other than a tax assessed under chapter 65 or 65A, may apply in writing to the commissioner, on a form approved by the commissioner, for an abatement thereof," within specified time limitations. Here, the appellants timely filed Forms CA-6, claiming to be aggrieved

by the self-assessment of unapportioned sales tax on the sales at issue. On its face, § 1 does not - explicitly or implicitly - prohibit seeking apportionment via the abatement process subsequent to collecting, remitting, and reporting sales tax.

Similarly, while the provisions of the Regulation set out methodologies for apportionment and relief of vendor liabilities, they do not prohibit apportionment through the abatement process and the Board found that they should not be construed otherwise. There is no language in the Regulation that limits the application of the abatement process in the context of apportionment. The absence of such limiting language is telling because the Commissioner has, on numerous occasions, incorporated such limitations in his regulations. For instance, 830 CMR 63.38.1(9)(d)1.g.i, which involves assignment of sales for apportionment purposes, states that when a taxpayer employs a method to properly assign sales on an original return:

> the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In such cases, ***neither the Commissioner nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer's methodology as applied for assigning such sales for such taxable year.***

(emphasis added). *See also* 830 CMR 63.38M.1(5)(d)3.c (Corporate elections to change research credit computation methods "must be made on the return for the taxable year in which the change will

take effect and may not be revoked or retroactively altered by filing an amended return or claim for abatement."); 830 CMR 63.32B.2(5)(c)3 (Revocation of a worldwide combined reporting election cannot be made "until after it has been effective for ten taxable years. . . . The revocation or renewal of an election shall be made on an original, timely filed return by the combined group's principal reporting corporation or as otherwise required in writing by the Commissioner."). Similarly, 830 CMR 63.42.1(3), which relates to applications for alternative apportionment of income subject to the corporate excise tax, provides that "[a]n application will not be considered if it is received by the Commissioner after the due date or, where applicable, the due date as validly extended, for the applicant's corporation excise return."

The Board also found that the timing constraints that are integral to the Commissioner's construction of the Regulation undermine his arguments. More specifically, the Regulation explicitly provides that it is effective October 20, 2006, but applies retroactively to transactions on and after April 1, 2006. 830 CMR 64H.1.3(1)(b). This retroactivity allowed taxpayers to seek apportionment of sales tax through the abatement process with respect to transactions that occurred well before the effective date of the Regulation. However, applying the Commissioner's view that all submissions of Forms ST-12 and certifications under

¶¶ (15)(a) and (15)(b) must be received by the due date of the applicable sales tax return, numerous transactions to which the abatement process was explicitly made available by the Regulation's retroactivity would have been excluded from that process. In other words, the temporal limits that the Commissioner has employed in his construction of the Regulation for purposes of this appeal, and which form part of the basis for the denial of the appellants' request for relief, directly contradict the plain terms of the Regulation.

The Regulation's treatment of direct pay permit holders is also instructive. As previously noted, the holder of a direct pay permit need not submit a Form ST-12. Rather, a holder must simply follow the provisions relating to apportionment methodologies found in 830 CMR 64H.1.3(15)(a)2 "in apportioning the tax due on prewritten computer software that will be concurrently available for use in more than one jurisdiction." 830 CMR 64H.1.3(15)(d). However, these provisions do not state that apportionment must be sought by the time the transaction is reported for sales tax purposes, or at any particular time for that matter. Rather, they simply mandate use of "any reasonable, but consistent and uniform, method of apportionment." 830 CMR 64H.1.3(15)(a)2. Thus there are no constraints, temporal or otherwise, that prevent direct pay permit holders from seeking apportionment through the abatement process under G.L. c. 62C, § 37. The Regulation's substantive

apportionment guidance can readily be applied to the facts of the instant appeals and the Board found no legal basis as to why direct pay permit holders could seek apportionment through the abatement process, but not vendors such as the appellants.

Finally, under G.L. c. 64H, § 8, purchasers may provide a Form ST-4: Resale Certificate or a Form ST-12 to inform vendors that purchases are not retail purchases, or that they are exempt from tax. This statutory scheme is construed in the Commissioner's regulations at 830 CMR 64H.8.1. In the absence of a certificate, the ongoing burden of proving that a transaction is not taxable is on the vendor, whereas a certificate relieves the vendor of that burden. However, neither the statute nor the regulations provide that delivery of a certificate is the only means by which an exemption may be obtained. *See* G.L. c. 64H, § 8. In fact, the abatement process is fully available to taxpayers for that purpose. *See, e.g.,* ***D&H Distributing Company v. Commissioner of Revenue,*** 477 Mass. 538, 546 (2017). The procedure applicable to G.L. c. 64H, § 8 in large measure parallels the use of direct pay permits, exempt use certificates, and certifications discussed in ¶¶ (15)(a) and (15)(b), all of which serve to shift burdens in specified ways but preserve the right of vendors to seek an abatement in the absence of certificates or permits. Like G.L. c. 64H, § 8, there is no language in § 1 or the Regulation that abrogates the right of a vendor to seek an abatement under § 37,

and the Board ruled that, as with G.L. c. 64H, § 8, a vendor's right to pursue a § 37 abatement is preserved regardless of whether an exemption certificate or certification has been provided.

V. CONCLUSION

Based on the foregoing, the Board found and ruled that if application of the Regulation's stated methodologies for apportionment resulted in a tax that was "excessive in amount or illegal," there was no basis in either § 1 or the Regulation to deny the appellants an abatement under G.L. c. 62C, § 37.

As discussed above, the Commissioner has sanctioned "any reasonable, but consistent and uniform, method of apportionment that is supported by . . . books and records as they exist at the time the transaction is reported for sales or use tax purposes." Paragraph (15)(a) also includes within the scope of acceptable apportionment methodologies those that are "based on number of computer terminals or licensed users in each jurisdiction where the software will be used."

The software in these appeals was intended for use by employees inside Massachusetts and at Hologic's offices around the country and internationally, and it was accessed by employees from their various work locations. With knowledge of these locations, Hologic provided data to the appellants that showed the percentage of use outside of Massachusetts. The Board found that this approach was consistent with the Regulation's methodologies. Further, as

previously noted, the Commissioner has explicitly stated that he did not intend to challenge the appellants' claimed apportionment percentages and he did not dispute stated amounts of tax collected and remitted by the appellants.

Having concluded that the appellants were entitled to seek apportionment through the abatement process under G.L. c. 62C, § 37, the Board applied uncontested apportionment percentages to undisputed amounts of sales tax to determine the amount by which the self-assessed tax exceeded the tax properly due. Accordingly, the Board issued a decision for the appellants ordering abatements of $59,099, $185,323, and $119,306.78, respectively, for Oracle USA, Inc., Oracle America, Inc., and Microsoft Licensing, GP, plus associated interest under G.L. c. 62C, § 40.

THE APPELLATE TAX BOARD

By: ________________________________
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: ________________________
Clerk of the Board